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Supreme Court, U.S.
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In THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

GURN H. FREEMAN, SR.
Petitioner, Appellant.

vs.

UNITED STATES OF AMERICA
Respondent, Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

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ORAL ARGUMENT REQUESTED

63pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not § 2255 provides a mechanism for relief where petitioner demonstrated to the district court, by affirmative evidence, that petitioner was convicted wrongly of a crime for which he was innocent, notwithstanding an adverse decision on direct appeal wherein it was also shown that the Supreme Court's prescribed evidentiary standard of review was not followed.

2. Whether or not this federal habeas corpus § 2255 petitioner is entitled to the same standard of review as state habeas corpus § 2254 petitioners regarding such "no evidence" due process issues raised in the United States District Court.

3. Whether or not the "no competent evidence and government perjury before grand jury" due process issue [i.e., Issue 16 in the § 2255 petition] is reviewable under Title 28 U.S.C. § 2255 where such issue was not raised at trial or on direct appeal, due to subsequent discovery.

4. Whether or not the "prosecutors deliberate misrepresentations of 'evidence' to the trial jury," due process issue [i.e., Issue 17 in the § 2255 petition] is reviewable under 28 U.S.C. § 2255 after adverse decision on direct appeal was tendered as a direct result of prosecutors continued misrepresentations to the appeals court.

5. Whether or not petitioner was entitled to a fair and unfettered direct appeal, denied via "false and misleading appellee briefs" due process issue [i.e., Issue 18 in the § 2255 petition] is reviewable under Title 28 U.S.C. § 2255 considering the habeas trial court's alleged lack of jurisdictional authority to correct errors made on direct appeal.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title 18, Chapter 63 — Mail Fraud, § 1341. Frauds and swindles, p. 4301, U.S.C.A.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. (June 25, 1948, ch. 645, 62 Stat. 763; May 24, 1949, ch. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Publ. L. 91-375, § (6) (j) (11), 84 Stat. 778.)

Title 18, Chapter 113 — Transportation of stolen goods, securities, money, fraudulent State tax stamps, or articles used in counterfeiting, § 2314, p. 4371, U.S.C.A.

Whoever transpsorts in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign government or by a bank or corporation of any foreign country. (June 25, 1948, ch. 645, 62 Stat. 806; May 24, 1949, ch. 139, § 45, 63 Stat. 96, July 9, 1956, ch. 519, 70 Stat. 507; Oct. 4, 1961, Publ. L. 87-371, § 2, 75 Stat. 802; Sept. 28, 1968, Pub. L. 90-535, 82 Stat. 885.)

Title 18, Chapter 19 — Conspiracy, § 371. Conspiracy to commit offense or to defraud United States, p. 4190-91, U.S.C.A.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, ch. 645, 62 Stat. 701.)

Title 18, Chapter 1 — Principals, § 2, p. 4151-52, U.S.C.A.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. (June 25, 1948, ch. 645, 62 Stat. 684; Oct. 31, 1951, ch. 655, § 17b, 65 Stat. 717.)

Uniform Commericial Code § 2-202 — Final Written Expression: Parole or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

U.S. Const., amend. V

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury . . . . be deprived of life, liberty, or property, without due process of law . . .

PROCEEDINGS IN THE COURT BELOW

The criminal action was commenced on 7/8/80 by the United States of America, in the United States District Court for the Western District of Michigan, Southern Division (G80-18), against petitioner, Gurn H. Freeman, Sr., who entered a plea of not guilty on all counts. Petitioner testified on his own behalf. Petitioner was convicted by trial jury of devising scheme or artifice to defraud by use of U.S. mails; aiding and abetting. Counts 1, 2, 3 and 4; 18 U.S.C. § 1341; 18 U.S.C. § 2(a). Transportation in Interstate Commerce of securities obtained by fraud; aiding and abetting. Count 7; 18 U.S.C. § 2314; 18 U.S.C. § 2(a). Conspiracy to defraud the United States; aiding and abetting. Count 8; 18 U.S.C. § 371; 18 U.S.C. § 2(a). Petitioner was acquitted of causing to be transmitted in interstate commerce by means of a wire communication for the purpose of executing the aforementioned scheme and aritifice.

Counts 5 and 6; 18 U.S.C. § 1843; 18 U.S.C. § 2(a).

On 9/8/80, Federal District Court Judge Wendell Miles entered judgment finding the petitioner guilty of 18 U.S.C. § 1341, 18 U.S.C. § 2314; 18 U.S.C. § 2(a); and 18 U.S.C. § 371 and sentenced him to imprisonment for five years as to each of Counts 1, 3 and 8, to run concurrently as to each of these Counts — as to Counts 2, 4 and 7, is to be placed on probation for five years to run concurrently upon release from confinement in a penal institution. Petitioner was also fined $1,000 as to Count 3 and $10,000 as to Count 8.

Petitioner filed notice of appeal on 9/8/80. The United States Court of Appeals for the Sixth Circuit entered judgement on 10/1/82, affirming all Counts: 1, 2, 3, 4, 7 and 8.

The judgement sought to be reviewed was issued and entered on Ocotober 1, 1982; petition for rehearing *en banc* was sought and it was denied on November 24, 1982 and was reissued on December 9, 1982.

Petitioner filed a Writ of Certiorari to the Supreme Court of the United States on February 4, 1983. On April 18, 1983 the United States Supreme Court entered an order denying the petition for a Writ of Certiorari.

Petitioner filed a Petition for Rehearing on a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit on May 13, 1983. On June 13, 1983 the United States Supreme Court entered an order denying the aforementioned Petition for Rehearing.

Petitioner filed a Petition for Writ of Habeas Corpus to the Supreme Court of the United States on October 18, 1983. On November 28, 1983, the United States Supreme Court entered an order denying Petition for Writ of Habeas Corpus.

Petitioner filed a Rule 35 motion to the United States District Court, Western District of Michigan on December 23, 1983. Federal District Court Judge Wendell Miles entered an order on November 13, 1984 denying all relief.

Petitioner filed a Title 28 U.S.C. § 2241 petition to the United States District Court, District of Kansas on April 11, 1984. On June 21, 1984, the United States District Court entered an order denying petitioner Title 28 U.S.C. § 2241 relief stating such issues should be brought under Title 28 U.S.C § 2255 jurisdiction. Such order was reaffirmed upon reconsideration on August 9, 1984.

Petitioner filed a Title 28 U.S.C. § 2255 petition to the United States District Court, Western District of Michigan, Southern Division, on November 14, 1984. On April 30, 1985, the United States District Court entered an order denying petitioner Title 28 U.S.C. § 2255 relief.

Petitioner filed notice of appeal from judgment in the § 2255 habeas trial court on May 20, 1985. On February 24, 1986, the United States of Appeals for the Sixth Circuit entered an order denying the § 2255 relief sought.

Petitioner has not received an evidentiary hearing with regard to any of the above-stated petitions or motions to wit petitioner raised fair trial, due process and sufficiency of evidence issues.

JURISDICTION

The judgment sought to be reviewed was issued and entered on February 24, 1986 and is set forth in Appendix B. The order of the habeas trial court from which such appeal was taken is also set forth in Appendix B. The opinion relied upon by both courts, the Magistrate's Report and Recommendation, is referenced in Appendix A. The jurisdiction of the Court is invoked pursuant to Title 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner's verified § 2255 pleadings to the district court set forth a prima facie case of how petitioner had been convicted wrongly of a crime of which he was innocent. The issues and facts therein demonstrated why such trial court and direct appeal disposition of the case was unconstitutional and therefore unworthy of respect and finality. Yet the habeas trial court, without regard to such § 2255 pleadings, limited the scope of review to the prior decisions.

Originally, the habeas district court did not dismiss petitioner's "no evidence" pleadings (and other issues) but rather ordered respondent to answer same according to Rule 5. However, respondent never confronted such issues and facts, but argued the "finality" of the prior decision forecloses inquiry into such § 2255 pleadings. The district court embraced respondent's argument and dismissed the § 2255 petition without holding an evidentiary hearing or making any factual inquiry as to the basis for such pleadings.

On appeal from such order, the U.S. Sixth Circuit Court of Appeals, in turn, summarily agreed with the decision of the district court. Thus, an "innocent" man has never been heard on the matter of his unconstitutional detention which rested not on the evidence which comes from the witness stand, but rather on what the Government attorney's falsely stated the evidence to be, first, to the trial court and second, in the their appellate briefs on direct review as the § 2255 petition demonstrates. How can a false representation § 1341 mail fraud conviction command *respect* and *finality* when the recipient of the jurisdictional alleged overt act testifies:

1. He could not remember *any* representations made by the convicted party (See App. D, Exhibit 1, Count 1 — Richard Jenkins testimony, Tr. 473-474);

2. He could only remember a single 10-20 minute discussion relating problems and possible solutions to the problems prior to paying the fees pursuant to a written contract for which quid pro quo was admitted (See App. D, Exhibit 2, Count 2 — Richard Herbert's testimony, Tr. 301, 303, 323-324 and Gov't brief on direct appeal, p. 23);

3. They could only remember being "introduced" to convicted party, no business discussions (See App. D, Exhibit 3, Counts 3 and 4 — Henry and Frank Clark's testimony, Tr.

367-368, 409-410);

4. He could recall "he," not Century, was to raise all "limited offering" funds under the Phase I business plan for which the Count 7, $7,500 was paid (Pl. Ex. F-36, p. 4); the first written contract (F-36) was a SYNOPSIS of his initial meetings with Century and the basis for employing them (See App. D, Exhibit 4, Count 7 — Gordon Webster's testimony, Tr. 812-813, 763-764);

5. He did not recall any alleged misrepresentations in the indictment and contrary to Count 8 pleading such July 12th letter (Pl. Ex. H-5) was handed to him and not mailed (See App. D, Exhibit 5, Count 8, sub. para. 4a — Ralph Erbe's testimony, Tr. 105-107 and respondent's § 2255 reply brief, p. 6); and

6. They "never knew" of the convicted party as petitioner had a complete business separation from Century Consultants prior to the fall of 1975 and thus never even knew of such persons prior to his trial (See App. D, Exhibit 6, Count 8b-d, incl. — Roger Dawson's testimony, Tr. 255; Frederick Boeldt's testimony, Tr. 294-295; Boeldt's contractor's testimony, Ray Quasius, silent as to petitioner; Ronald Bosse, Count 8, 4c, did not testify at trial; Wagner's testimony, Tr. 1032-1033).

The federal statutes upon which such convictions rest all demand such alleged overt acts to be in furtherance of the specified criminal acts, yet such recipients' testimony is silent, contrary to or absent any support for the alleged misrepresentations (para. 3-7 of indictment). Neither the original trial court nor direct appeal dealt with such discrepancy, yet both the habeas trial court and appellate habeas review claim such judicial decisions command *respect* and *finality* without so much as an evidentiary hearing on such issues and uncontroverted facts. In a federal trial, such lack of evidence as to the essential elements has traditionally deemed to require reversal on such convictions (Ground 3, original petition).

Petitioner's other issues and facts relating to a denial of "due process" (Ground 4 thru 7, inclusive) likewise were summarily disposed of under the same claim of *respect* and *finality*, notwithstanding the uncontroverted denial of "due process" and "fair play" at every critical stage of those judicial proceedings, for example: gov-

ernment agents, Campbell and Belz, would interview former clients of Century Consultants and thereafter "manufacture" false representations of funding "by Century" via their exclusive testimony before the grand jury:

a) FBI Agent Campbell's 1-17-80 Investigative Report (see Ex. Supp. pp. 50-51) as to alleged victim Jenkins: Jenkins, a January 1975 client, according to Campbell's statement, was told that Century Consultants "had funded" an alleged victim's (Webster) shopping center. However, it would have been impossible for *anyone* to have made such a representation to Jenkins in January 1975, or at any time prior thereto because no one from Century could have known of Gordon Webster, per his testimony, he first came to Century in March of 1975.

b) Postal Inspector J. K. Belz, in his Investigative Report (see Ex. Supp. pp. 60-66) as to alleged victim Erbe, stated: ". . . Freeman went into depth about a company which raised two story houses from one story. Freeman said *Century Consultants obtained investors* for them and was able to raise the capital through these investors" (emphasis added).

Erbe's testimony, on "direct" examination, proves Belz's statement to be blatantly false (Tr. 97):

Q. Forgive me Mr. Erbe, is it your testimony that Mr. Freeman said they raised funding for the raising of the house project?

A. No. The company that was doing it. That company that was raising these houses, the construction company or what ever it was.

The government's willingness to use Belz's false statement did not end with the grand jury; the Prosecutor, Morse, "lied" to the trial jury when he "substituted" Belz's false statement for Erbe's testimony (Morse's closing argument, Tr. 1963):

> "You remember — you remember the house raising project? The project where the man would raise the house and build a house underneath it? *'We successfully funded this man'. That was the evidence"* (emphasis added).

And Morse again repeated the same lie to the Sixth Circuit (Gov't 2nd Reply Brief, p. 1):

> "Appellant [Freeman] told Erbe about a 'house raising project' where the company would raise a ranch house and put another floor underneath *for which Century, Inc., had raised funds*" (emphasis added).

Moreover, this same falsehood (in addition to many others) is again repeated by Respondent in his § 2255 brief, p. 6:

> "The witness [Erbe] remembered that one of the several businesses *Mr. Freeman and Century had raised funds for* was one which raised up houses and built floors underneath the raised part . . . (Tr. 96-97)" (emphasis added).

The § 2255 pleadings diagramed how petitioner's rights to "due process of law" were systematically abused in the proceedings below, however, such habeas reviewing courts' response was to deny review despite the pleadings, the § 2255 statute and the case law relied upon therein.

Furthermore, such habeas reviewing courts refused to entertain petitioner's equal protection claim (Ground 2) to the same standard as review as state habeas corpus § 2254 petitioners receive wherein "no evidence-due process" issues are raised in the U.S. District Court ***(Jackson v. Virginia).***

Petitioner's facts on appellate habeas review were not accepted as true contrary to ***Wright v. Dickerson,*** 336 F.2d 878, 881 (9th Cir. 1964) and such other case law. Petitioner's § 2255 pleadings were supported by testimony from the witness stand, government exhibits and government statements recorded in the judicial proceedings below. Neither conjecture nor innuendo was utilized to bring such issues and facts within the scope of such case law relied upon therein.

The appellate habeas reviewing court's claim to have reviewed the presented record, petitioner's pleadings and facts in support of same and, thereafter, orally declare such assignments of error were not well taken, in effect, presents a *conflict* with numerous Supreme Court and appellate court decisions regarding the scope of habeas corpus review as well as the proper constitutional standard regarding a finding of guilt beyond a reasonable doubt as to the proof of the essential elements of the crime.

Respect and finality can only be given to decisions which

satisfy all the constitutional safeguards, including the right to habeas corpus review. An ensuing detention does not become constitutional merely because a decision perseveres up to the point of Title 28 U.S.C § 2255 review.

ARGUMENT I

GROUND I

> Whether or not § 2255 provides a mechanism for relief where petitioner demonstrated to the district court, by affirmative evidence, that petitioner was convicted wrongly of a crime for which he was innocent, notwithstanding an adverse decision on direct appeal wherein it was also shown that the Supreme Court's prescribed evidentiary standard of review was not followed.

INTRODUCTION

The issues raised on petition of habeas corpus § 2255 were not substantively addressed in either the court-ordered government answer or the habeas trial court's Magistrate's Report and Recommendation. The first fifteen due process issues raised in the habeas trial court sought a ***Jackson v. Virginia,*** 443 U.S. 307 (1979), resolution:

> whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Id.* at 319.

However, neither the habeas trial court nor such appellate review specifically responded to the constitutionally mandated scope of review, but instead ruled such prior legal decisions were due *respect* and *finality*.

The burden of providing the original fact finder with evidence of the essential elements of the counts upon which one is found guilty under the federal mail fraud statutes and thereafter sentenced can not be extinguished by judicial proceedings which proclaim due process has been met. Petitioner submits the "no evidence" issues and supporting facts within such § 2255 pleadings demonstrate the government's failure to substantiate that such recipients of the overt acts were victims of the misrepresentations alleged to have been made by petitioner, Powell or Wagner, while he was associated with

Century Consultants and such clientele. Thus, the government never provided testimony or exhibits to the original fact finder to show the U.S. Mail was used *in furtherance* of the scheme to defraud misrepresentations.

Petitioner submits he should not be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. ***In re Winship,*** 397 U.S. 358 (1970).

Specifically Re: Issues 1 thru 15 (original petition):

Petitioner, Wagner and Powell were "individually" charged with committing several counts of mail fraud by knowingly making misrepresentations alleged in paragraphs 3 thru 7 to the clients listed in paragraph 1 of the February 28, 1980 indictment (see Exhibit Supplement to § 2255 petition, pp. 1-14, hereinafter "Ex. Supp."). The three named defendants were also charged with conspiracy to commit mail fraud upon the basis of such scheme as depicted in paragraphs 1 thru 8 of such indictment. Petitioner contends his convictions on the substantive counts (Counts 1, 2, 3, 4, and 7) as well as the conspiracy count (Count 8) are void as a matter of law wherein the actual testimony of his accusers, pre-fall of 1975 clients, does not establish "his" accusers, as victims of "his" representations or Powell and Wagner's.

The federal mail fraud statutes and conspiracy statute demand an overt act to be in furtherance of misrepresentations knowingly made by an accused in a scheme to take money or property from the recipient of such misrepresentations. In the instant case, those three elements of mail fraud were not reviewed within the context that "each" alleged victim's testimony must first establish "him" as a recipient of the scheme to defraud misrepresentations listed in paragraphs three through seven of Count 1 and repeated in the first paragraph of Counts 2, 3, 4, 7 and 8. If such alleged victim's testimony cannot establish his membership as a victim of such "misrepresentations made by petitioner, Powell or Wagner," then the Court should vacate the sentence as to such substantive and/or conspiracy counts involving that recipient of the alleged overt acts. Jenkins, Herbert, Clarks, Webster, Edleman, Erbe and Morgan, pre-fall of 1975 clients, *were not* victims of the misrepresentations alleged to have been made according to *their* account of the oral and written rep-

resentations.

Petitioner's complete business separation prior to the fall of 1975 along with the testimony of such pre-fall of 1975 clients exonerating petitioner from making the alleged misrepresentations demonstrates that neither petitioner nor such pre-fall of 1975 clients were part of Wagner and Powell's scheme to defraud Dawson, Raleigh and Boeldt as established by such post-fall of 1975 client's testimony. The basis for petitioner's § 2255 relief is firmly established in case law, the criminal statutes and within the due process clause of the U.S. Constitution. Issues 1 through 15 question whether or not *any* of the three elements of mail fraud and conspiracy to commit same were demonstrated with regard to Count 1, 2, 3, 4, 7 and 8 (4a) recipients of such U.S. mail and/or interstate wire transmission.

Mispresentations Alleged to Have Been "Made" by Petitioner:

1. The indictment in paragraph 7 purports that financial data was requested by petitioner, Wagner or Powell . . . "representing that such statements and documents *were required* and *would be used to obtain financing for them* through Century Consultants' sources . . . " (emphasis added). The trial record reflects that pre-fall of 1975 clients were "ASKED" to fill out a booklet seeking business planning and financial data. But such a request does not even approach the above-stated alleged misrepresentation.

2. The indictment in paragraph 5 further alleged petitioner, Wagner or Powell would represent . . . "that they (prospective clients) *must be accepted* by the 'New Client Committee' *before they* (Century) *would begin preparing the business plans* (i.e., allegedly designed *for the stated purpose of obtaining financing* for the client — para. 3) . . ." (emphasis added). Again, the trial record reflects that such pre-fall of 1975 clients did not testify to such misrepresentation being made to them. The trial record, however, does reflect that such pre-fall of 1975 client was made a written offer of services which the client, and not Century, could accept by payment of a retainer fee and authorization to perform the consulting work outlined therein (i.e., See Ex. Supp. Herbert's offer, A-3, p. 4: "in order for us to commence work on this project, we require a retainer of $5,000 to be applied against our fees in connection with the aforementioned consulting work . . . "). And such clients admitted to contracting for "business plans" designed to be funded by the

client (i.e., Herbert, Tr. 323-24).

3. The indictment in paragraph 6 further alleged petitioner, Wagner or Powell . . . "would inform (pre-fall of 1975 clients) that a certain amount of 'seed capital' would have to be raised from the clients own sources and that *it would have to be paid to Century Consultants for fees in order to continue work on arranging the majority of the financing* . . . " (emphasis added). And once again, the trial record of such pre-fall of 1975 clients' testimony does not substantiate such alleged misrepresentation being made to those clients. The record does reflect oral and written representations for some of the clients to raise "seed capital" to pay for the completion of their limited offering business plans designed to be capitalized by the client (i.e., See Ex. Supp. Webster's contract, F-36, p. 4, "with respect to our fees for the work outlined above in Phase I" — request balance due on business plan, $7,500 to be paid out of $25,000 in seed capital to be raised, after first paying $3,500 retainer fee).

4. The indictment in paragraph 4(a) and (b) alleged petitioner, Wagner or Powell represented Century *had numerous sources* of funding and *they had been successful in obtaining funding for numerous previous clients*. (emphasis added). However, no pre-fall of 1975 client testified to such misrepresentations being made to them by any of the defendants. (See Memorandum in Support of Motion to Vacate § 2255, No. G84-1251CA, pp. 52 to 55 for detailed examination of such pre-fall of 1975 clients' testimony regarding 4(a) and (b), hereinafter "Memo").

5. The indictment in paragraphs 4(c) through (e) describe alleged misrepresentations made by petitioner, Wagner or Powell *with regard to Century sources*. (emphasis added.) However, once again such pre-fall of 1975 clients' testimony either is silent [i.e., 4(c) or their testimony does not describe such representations [i.e., 4(d) and (e)] within the context of the indictment. For example, the need for sources was discussed with Morgan, Edleman and Webster, but not as to the Phase I capitalization plan for which the fees in questions were tendered, but rather as to their Phase II "contingent" future performance which was to follow the clients' successful Phase I capitalization of the limited offering plan they purchased. However such clients failed to perform as "they" promised or they decided not to pursue any part of the plan; in either case, Century could not perform the *future* task due to the client's action. [See Memo, pp. 49

and 50, for detailed examination of such pre-fall of 1975 clients' testimony regarding 4(d) and (e).]

6. The indictment in paragraph 4(f) alleged petitioner, Wagner or Powell would represent to pre-fall of 1975 clients . . . "that defendants would prepare a business plan for such client *which would show what methods of funding Century Consultants would use to obtain funding for the client* . . . " (emphasis added). Once again the misrepresentation alleged contradicts the oral and written representations reflected by such pre-fall of 1975 clients' testimony. And such "accusers" testimony is again silent with regard to paragraph 4(f)'s *description of the business plan allegedly offered.*

Petitioner does not contend that Dawson, Raleigh and Boeldt, all post-fall of 1975 clients, were not victims of many of the misrepresentations alleged in paragraphs 3 thru 7; but those misrepresentations were made by Powell and Wagner to clients petitioner never met or knew of due to such business divorce in the fall of 1975. The trial record demonstrates petitioner, Powell and Wagner did not make such misrepresentations to pre-fall of 1975 clients. Petitioner should not be held responsible for acts committed after he left Century in the fall of 1975. Likewise, the scheme to defraud as established by post-fall of 1975 clients should not bootstrap back to an earlier period of time so that pre-fall of 1975 clients would be considered mail fraud victims simply because the government showed letters were mailed to such persons.

Specifically Re: Issues 1 thru 3:

Petitioner was found guilty of Count 1 § 1341 mail fraud without any evidence of the alleged misrepresentations (para. 3-7) being made to Jenkins by petitioner. Jenkins could not recall any representations, of any kind, made by petitioner (Tr. 473-74). Jenkins' testimony does not establish Jenkins as an "alleged victim" and therefore, the mailing of Jenkins' letter cannot be established as an act in furtherance of such alleged fraudulent conduct. Moreover the third critical element of § 1341 mail fraud is also missing as his $500 was not proven to be taken by such alleged fraudulent conduct. Jenkins testified that he "knew" he had to obtain the funding because that's what he was "told" (Tr. 485-486). Jenkins' testimony that he did not receive any funding from Century for his $500 (Tr. 481) does not establish that funding by Century was ever represented for such $500. The Count I conviction was attained without any proof of the

three critical elements of § 1341 mail fraud.

Specifically Re: Issues 4 thru 6:

Petitioner was found guilty of Count 2 § 1341 mail fraud without any evidence of the alleged misrepresentations (para 3-7) being made to Herbert or Howard by petitioner. Herbert and Howard's testimony does not establish themselves as "alleged victims." Herbert only remembered a general discussion with petitioner relating problems and possible solutions to the problems (Tr. 301-02) and specifically rejected any petitioner representation of funding by Century (Tr. 303). Howard recalled being told they would have to raise their own money (Tr. 343-44). Moreover, Herbert acknowledged the fact that Century was to produce a business plan designed to be funded by them *prior to paying the $5,000* (Tr. 323-24). Thus, the mailing of a statement (billing) for the business plan (Pl. Ex. A-11) already completed was not shown to be in furtherance of such alleged fraudulent conduct. Furthermore the third critical element of § 1341 mail fraud is also missing as their $5,000 was not shown to be taken by fraud. The Count 2 conviction was attained without any proof of the three critical elements of § 1341 mail fraud.

Specifically Re: Issues 7 thru 9:

Petitioner was found guilty of Counts 3 and 4 § 1341 mail fraud without any evidence of the alleged misrepresentations (para. 3-7) being made to the Clarks by petitioner. The Clarks could not possibly substantiate any of the alleged misrepresentations as having been made by petitioner because they were only "introduced" to petitioner (Tr. 367-68, 409-10). Two statements (Count 3, para. 2 and Count 4, para 2) were alleged to have been mailed in furtherance of the misrepresentations made by petitioner, however, the non-existent proof of such petitioner's conduct demonstrates that such letters could not possibly be in furtherance of the criminal conduct alleged. Moreover, the third critical element of each count of § 1341 mail fraud was also missing as their $3,500 was not proven to be taken by petitioner's alleged fraudulent conduct. Frank Clark's testimony reaffirmed that the written contract, C-1, was intended to put into writing what they had gone over verbally in the first meeting (Tr. 443-44). The Clarks received the performance promised for the $3,500 (Tr. 388). The Count 3 and 4 convictions were attained without any proof of the three critical elements of § 1341 mail fraud.

Specifically Re: Issues 10 thru 12:

Petitioner was found guilty of Count 7 § 2314 mail fraud without any evidence of the alleged misrepresentations (para. 3-7) being made to Webster by petitioner. Webster did not substantiate a single alleged misrepresentation as being made by petitioner. Webster acknowledged his written offer of services (F-36) as a synopsis of his first meetings with Century Consultants *and the basis for employing Century* (Tr 763-64). While petitioner was associated with Century (pre-fall 1975), Webster paid a $3,500 retainer and the May 29th $7,500 interstate transaction (Count 7, para. 2) pursuant to the April 22, 1975 contract, F-36, p. 4 "with respect to our fees for the work outlined above in *Phase I*" and he received the promised performance, Pl. Ex. F-23. Webster testified "he" was to raise the *initial funding* (limited offering) called for in his first contract under Phase I (See Ex. Supp. p. 32, Pl. Ex. F-36, para 3, 4b-d). Moreover, he negated that the raising of the $1,000,000 (Phase II "contingent fee" financing by Century, second contract June 9, 1975, See Ex. Supp., pp. 28, 29, Pl. Ex. F-33) had anything to do with the limited offering ($7,500) plan which ". . . I [Webster] had to go out and sell that to ten people" (See Exhibit 4, Tr. 812-13:

Q. Now sir, was this (raising of limited offering) for the $1,000,000?

A. No. *(Id.* at Tr. 812-13).

The $7,500 interstate transaction was not established as an act in furtherance of such alleged fraudulent conduct. Moreover, the third critical element of § 2314, the $7,500, was not proven to be taken by such alleged fraud as the oral and written representations as well as Webster's testimony contradict such a finding. Funding by Century, the $1,000,000 contingent fee financing, was discussed as a future project, "later down the road that's what we discussed" (Tr. 649), but Webster's admitted embezzlement foreclosed such future performance under the second contract (Tr. 755). The count 7 conviction was attained without any proof of the the three critical elements of § 2314 mail fraud.

Specifically Re: Issues 13 thru 15:

Petitioner was found guilty of Count 8 § 371 conspiracy to commit mail fraud without any evidence that such scheme to defraud misrepresentations (para. 3-7) were made to any clients by petitioner, Wagner or Powell during the time petitioner was still as-

sociated with Century (fall of 1975). Jenkins, Herbert (and Howard), the Clarks, Webster, Edleman, Erbe and Morgan all testified consistent with their written offer of services and understood *they would have to raise all the monies called for in the business plans they authorized Century to produce* (and even the government on appeal admitted same, see Appendix C, Government Admissions).

All pre-fall 1975 clients tendered all fees in question pursuant to the written offers (see Ex. Supp. B, pp. 15-49) and Century (petitioner) did provide the "seed capital" and "limited offering" business plans promised pursuant to those written contracts (and the government also admitted same on appeal, see App. C). The pre-fall of 1975 clients' testimony was silent on the alleged misrepresentations (para. 3-7) being made by petitioner, Wagner or Powell (see Memo, p. 30, f.n. 22). All pre-fall of 1975 alleged overt acts were consistent with the oral and written representations and were not shown to be in furtherance of the alleged "scheme to defraud" misrepesentations. No pre-fall of 1975 clients paid fees and did not receive their promised performance, contrary to paragraph 8 of the indictment.

Petitioner was not shown to be a member of Wagner and Powell's scheme to defraud Dawson, Boeldt and Raleigh. Contrary to Count 8, paragraph (4a) pleading such July 12 letter (Pl. Ex. H-5) was handed to Erbe, not mailed (Tr. 105-107) and respondent's § 2255 reply brief, p. 6, admitted same (see App. D, Exhibit 5). It should also be noted that Count 8, para. 4b-d recipients had never known of petitioner (See App. D, Exhibit 6). None of the alleged overt acts were shown to be in furtherance of the conspiracy to defraud misrepresentations as to petitioner. The scheme to defraud misrepresentations were established by Dawson, Boeldt and Raleigh's testimony regarding Wagner and Powell's representations made after petitioner's "complete separation" from Century (Tr. 1032-1033).

The Count 8 conspiracy conviction was attained without any proof of the three critical elements of § 371 conspiracy to commit mail fraud.

Summary of Issues 1 thru 15:

The due process clause of the Fifth Amendment guarantees petitioner against deprivation of his liberty where the allegations of misconduct, the alleged misrepresentations (para. 3-7), were not

shown to have been made by petitioner according to the testimony and exhibits presented at trial. The government had every opportunity to question petitioner's accusers but failed to establish any of the misrepresentations as being made by him or his alleged co-conspirators at or before the time he left Century Consultants in the fall of 1975. Petitioner's accusers described discussions which involved soliciting financial data; raising seed capital; citing previous client projects; relating various types of business plans set forth in their contracts; and the like. But those topics were not discussed within the context alleged in the indictment. The topics discussed were shown to be consistent with Century's written appraisal of what they could do for the prospective client *if the client chose to retain Century and authorize the work outlined in the proposal*. The mailings and $7,500 interstate transaction were lawful acts not shown to be in furtherance of the alleged misrepresentations. The alleged overt acts were in fact consistent with the oral and written representations made in those clients' offer of services. Century accepted the alleged fraudulently taken fees in response to its written offer of services and thereafter, delivered their promised performance. The fees were earned and not taken by fraud.

After petitioner left Century, Wagner and Powell promised to deliver limited offering business plans but did not (Tr. 214, 614). They falsely represented Century sources were interested and ready to fund client's project (Tr. 227-28, 272, 283). They also misrepresented Century had previously funded a prior client but had not (Tr. 200-01). And such misrepresentations were made to convince the clients to pay them the fees sought under such post-fall of 1975 clients' written contracts. The mails and wire transmissions were used in furtherance of their scheme to defraud Dawson, Raleigh, and Boeldt of the monies paid to Powell and Wagner's Century Consultants business entity. The alleged scheme to defraud and conspiracy began after petitioner had left Century according to such post-fall of 1975 clients' testimony.

Petitioner's § 2255 Review Was Denied Without Consideration of Merits for Unconstitutional Detention:

In 1979 the ***Jackson*** Court disclosed there was but *one* acceptable constitutional standard of review wherever reasonable doubt as to the evidence of the essential elements is claimed to be deficient.

The testimony of petitioner's accusers can not be distinguished

or diminished for its evidentiary capacity to unequivocably prove no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. 443 U.S. at 319. Jenkins' "no representation remembered" testimony, and the like, demonstrates that such evidentiary facts were not applied to the ***Jackson*** standard, not in 1980 at the close of the Government's case upon motion for judgment of acquittal and not on direct appeal in 1982, when sufficiency (evidence) of the essential elements as to various counts was raised.

Where such prior legal decisions do not incorporate the proper scope of inquiry, the ***Jackson*** standard, such judicial decisions should not command *respect* and *finality*. Petitioner submits there is only ONE standard, and it was not applied to any of such judicial proceedings below.

Under 28 U.S.C. § 2255, a federal court must entertain a claim by a federal petitioner that he or she is being held in "custody" in violation of the Constitution. This was not done. No consideration was given to the merits of petitioner's claim of unconstitutional detention. Rather, the habeas trial court and the appeals court relied on the prior decisions which applied an unconstitutional standard of review. Petitioner does not feel the ends of justice, habeas corpus review, can be met by attempting to summarily dismiss the fifteen Fifth Amendment due process "no evidence" issues raised.

In ***United States v. Frady,*** 456 U.S. 152 (1982), this Court recognized Congress' intent in § 2255 review to allow collateral attacks to be decided upon the merits where affirmative evidence was shown the petitioner had been wrongly convicted of a crime of which he was innocent *Id* at 171.

In ***Stone v. Powell,*** 96 S. Ct. 3037, 3044 (1976), the Supreme Court further distinguished claims cognizable under 28 U.S.C. § 2255:

> . . . Fourth Amendment violations are different in kind from denials of Fifth and Sixth Amendment rights in that claims of illegal search and seizure do not "impugn the integrity of the fact finding process or challenge evidence as inherently unreliable; that the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations by law enforcement officers." *Id.*

The fifteen issues raised in the present case do not seek a "prophylactic device" as in ***Frady*** and ***Stone;*** petitioner seeks the "full and fair consideration" enumerated in ***Stone:***

> . . . "full and fair consideration" . . . means the trial court must hold an evidentiary hearing and reach and decide the constitutional claim on the merits. ***Townsend v. Sain,*** 372 U.S. 293, 314 (1963). *Id.* at 3049, 3052 & n. 36.

Petitioner believes his first fifteen issues should receive § 2255 consideration because his pleadings, facts in support thereof, and such accompanying memorandum clearly show the conviction obtained under Count 1, 2, 3, 4, 7 and 8 are without any evidentiary basis regarding the essential elements. Such "no evidence" § 2255 issues were meant to survive the collateral estoppel argument forwarded by the government (e.g., Memorandum Response to Section 2255 Motion) and thereafter adopted by Magistrate's Report and subsequently embraced by the Court of Appeals. The United States Supreme Court in ***Jackson v. Virginia,*** 443 U.S. 307, 314 (1979), stated;

> The "no evidence" doctrine of ***Thompson v. Louisville*** thus secures to an accused the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty. *Id.*

The Supreme Court has often declared the sole purpose of this section authorizing motions for correction of sentence was to minimize difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum, and it was not the purpose of this section to impinge upon prisoner's rights of collateral attack upon their convictions, ***United States v. Hayman,*** 72 S. Ct. 263 (1952); also see ***Kaufman v. United States, supra; Aronson v. May,*** 85 S. Ct. 3 (1964); ***United States v. Morgan,*** 74 S. Ct. 247 (1954). Petitioner's issues 1 through 15 set forth a classical case for a wholly arbitrary deprivation of liberty without due process of law; such issues deserve a "full and fair consideration" based upon the merits.

Petitioner submits the limited scope of review afforded in the proceedings below, no consideration of the § 2255 pleadings demonstrating unconstitutional detention based on finality of prior decisions, is inconsistent with Congress' intent in enacting Title 28

U.S.C. § 2255 and in conflict with the opportunity to assert federal rights and secure the fundamentatl right to adequate protection of constitutional rights enumerated in ***Kaufman v. United States,*** 391 U.S. 217 (1969), and other Supreme Court cases.

ARGUMENT II

GROUND 2

> Whether or not this federal habeas corpus § 2255 petitioner is entitled to the same standard of review as state habeas corpus § 2254 petitioners regarding such "no evidence" due process issues raised in the United States District Court.

This court should note petitioner's § 2255 equal protection/due process fifth amendment issue *was not* substantively reviewed by the habeas trial court nor the habeas appellate panel.

The Magistrate's Report and Recommendation filed by U.S. Magistrate Stephen W. Karr, approved by Chief Judge Wendall A. Miles and thereafter adopted by the appellate habeas court called for the summary dismissal of Issues 1 through 15 as

> [t]hey are all based, in one or another, on an alleged insufficiency of evidence to sustain his convictions on the various counts. The issue of the sufficiency of evidence was the primary issue which the Sixth Circuit Court of Appeals considered and decided adversely to Freeman in affirming his conviction. *Id.* at p. 2.

Such reliance upon the judicial holdings on direct appeal became their justification for summarily dismissing all the issues raised in petitioner's § 2255 pleadings. Moreover, it should be noted the prior decision in ***United States v. Freeman,*** Docket No. 80-1624, October 1, 1982, did not respond to such 15 "no evidence" issues as to each element of petitioner's convictions on the various counts. Petitioner believes Congress enacted Title 28 U.S.C. § 2255 to review this type of issue and others as well. Furthermore, the Supreme Court in ***Kaufman v. United States,*** 391 U.S. 217 (1969), declared:

> Opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief, and provision of federal collateral remedies rests more fundamentally on a recognition that adequate protection of constitutional rights relating to criminal trial process

requires continuing availability of a mechanism for relief, and such is no less true for federal prisoners than it is for state prisoners. Title 28 U.S.C. § 2255.

The ***Kaufman*** Court, like ***Jackson, supra,*** believed that the respective habeas corpus statute does not presume such federal or state proceedings will always be without error in a constitutional sense, and it is the occasional abuse that the federal writ of habeas corpus stands ready to correct. *Id.* at 323 and 322 respectively. It is quite evident from 28 U.S.C. § 2254 case law that in a habeas proceeding, a state petitioner is *entitled* to a determination regarding a sufficiency of evidence issue. The requirement under the Due Process Clause of the fourteenth amendment that a criminal conviction be based upon proof of guilt beyond a reasonable doubt can be effectuated only if a federal habeas corpus court, in assessing the sufficiency of the evidence to support a state court conviction, inquires "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***Jackson v. Virginia, supra*** at 319. Also see ***U. S. ex rel. Guillen v. DeRobertis,*** 580 F. Supp. 1551 (D.C. Ill. 1984); ***Moore v. Duckworth,*** 579 F. Supp. 1431 (D.C. Ind. 1984); ***Martin v. State of Alabama,*** 730 F.2d 721 (C.A. Ala. 1984); ***McClesky v. Zant,*** 580 F. Supp. 338 (D.C. Ga. 1984).

Petitioner, under the fifth amendment equal protection clause stated by Chief Justice Warren in ***Bolling v. Sharpe,*** 347 U.S. 497 (1954), contends he is entitled to the same standard of review in consideration of his first fifteen "no evidence" issues. The Magistrate's recommendation to summarily dismiss Issues 1 through 15 without review upon the merits is constitutionally impermissible under the fifth amendment guarantee of equal protection under the laws. The Constitution of the United States under amendment 5 demands the fair administration of justice both as to access and equity in criminal cases. In ***Pilon v. Bordenkircher,*** 444 U.S. 1 (1979), a Sixth Circuit Court of Appeals case, the United States Supreme Court upheld the above enunciated standard of review for state § 2254 ***Jackson v. Virginia***-type petitioners by stating:

> Although it is quite possible that the evidence against petitioner will survive a challenge under the correct constitutional standard, he is entitled to have his application for habeas corpus considered under that standard. *Id.* at 2.

Petitioner requests no greater consideration of his "no evidence" 1 through 15 issues than that afforded § 2254 petitioners. Both equal protection and due process emphasize the central aim of our entire judicial system — all people charged with a crime must, so far as the law is concerned, stand on an equality before the bar of justice in every American court. The Magistrate's Report and Recommendation adopted by Judge Miles and the habeas appellate court is contrary to constitutional "equal protection" and prevailing case law; petitioner's issues 1 through 15 should have been reviewed on their merit in the habeas district court. Due Process/Equal Protection, amend. 5.

ARGUMENT III

GROUND 3

> Whether or not the "no competent evidence and government perjury before grand jury" due process issue [i.e., Issue 16 in the § 2255 petition] is reviewable under Title 28 U.S.C. § 2255 where such issue was not raised at trial or on direct appeal, due to subsequent discovery.

The Government Misled the Grand Jury:

Petitioner was denied his constitutional right, [i.e., "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . ." U.S. Constitution, amend. 5.] to a "fair and impartial" grand jury proceeding whereby the federal prosecutors and agents knowingly prejudiced the rights of petitioner before the Grand Jury by negating the independence of such body by and through the suppression of vital facts known to the government; corruption of the investigatory process by representing "facts" in false light; concocting the charges in the indictment without the direction or discretion of the grand jurors and otherwise intimidating and coercing the grand jurors to return an indictment upon facts not known to the grand jury. [See Memo, para. sub. A thru C, pp. 14-30.] But for the coercion, deception, intimidation and advocacy of the government prosecutors and agents, the grand jurors would not have held petitioner to answer for an alleged conspiracy to commit and the federal mail fraud violations depicted in the government-drawn indictment. Due process of law is that process of impartial law which is binding because it is right. ***United States ex re. Montgomery v. Ragen,*** 86 F. Supp. 382, 388

(N.D. Ill. 1949).

Petitioner believes his issue 16 (original petition) provided the District Court with substantial reason to question whether or not "*some* competent evidence" was forwarded to the grand jury to sustain the indictment against this petitioner. No alleged victim testified before the grand jury and one can only presume that the government agents who testified before the grand jury confined themselves to the pre-investigation reports they allegedly solicited from such alleged victims, otherwise their testimony would be *pure perjury* as such agents were without any personal knowledge of the matters being investigated. Petitioner in his § 2255 petition exhibited such reports and demonstrated the "inherent unreliability" of such later grand jury testimony. Petitioner also set forth specific instances whereby Mr. Philip Morse, U.S. Assistant Attorney, obviously misrepresented to the grand jurors petitioner's contracts and testimony (e.g., such information was derived from the grand jury minutes regarding his testimony). Petitioner further states that under ***Frady*** such absence of objection at trial and on direct appeal *does not* necessarily preclude § 2255 consideration wherein "affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent, "*id.* at 171. Moreoever, ***Stone*** also holds where the § 2255 issues "impugn the integrity of the fact finding process or challenge evidence as inherently unreliable," *id.* at 3044, that such § 2255 issues regarding fifth and sixth amendment rights are cognizable under this section.

Petitioner believes as the ***Jackson*** Court declared that constitutional rights are not to be lightly abjured and should be appraised by a federal habeas corpus court. *Id.* at 323. However the Magistrate's Report, joined by Judge Miles and the habeas reviewing panel, deferred such an appraisal citing, ***United States v. Adamo***, 742 F.2d 927 (6th Cir. 1984), as holding that "but for" contentions are not to be indulged upon by the courts or counsel. But such "but for" contentions in ***Adamo*** are not applicable herein as the conduct complained of is subject to verification via an *in camera review* of these judicial proceedings. It would appear the maxim, "Equity suffers not a right without a remedy," is not viable regarding the unconstitutional conduct which precipitated this long and difficult judicial process.

The Magistrate's Report also noted the Supreme Court in ***Frady*** extended the cause and prejudice test of ***Wainwright v.***

Sykes, 433 U.S. 72 (1977), to collateral review of federal convictions under § 2255 and further noted that Issue 16 was not raised at trial or upon appeal. The Magistrate's Report concluded from Freeman's representation by counsel throughout such proceedings:

> There is no reason to believe that the alleged facts upon which this ground is based were not known to Freeman or his counsel at a time when this ground could have been raised in the trial court or on direct appeal. Thus, the "cause" prong of the ***Frady*** test is not satisfied. More importantly, the "actual prejudice" prong is not satisfied. *Id.* at p. 8.

Representation by counsel does not, in and of itself, impart complete knowledge of the facts and/or all defenses available to an accused, and same is particularly true, wherein opposing counsel seeks to deceive the accused as well as the fact finders. Moreover, the Magistrate's Report in citing ***Frady*** forgot to take into account that which would override such absence of objection at trial or on direct appeal, a showing of "affirmative evidence indicating that he had been convicted wrongly of a crime of which he was innocent." *Id.* at 171. The Magistrate's Report and Recommendation adopted by Judge Miles and affirmed by the appellate habeas court is contrary to the prevailing case law, § 2255 federal habeas corpus statute and constitutional "due process." Petitioner's issue 16 should have been reviewed on its merit in the habeas district court.

ARGUMENT IV

GROUND 4

> Whether or not the "prosecutors deliberate misrepresentations of 'evidence' to the trial jury, due process issue [i.e., Issue 17 in the § 2255 petition] is reviewable under 28 U.S.C. § 2255 after adverse decision on direct appeal was tendered as a direct result of prosecutors continued misrepresentations to the appeals court.

In the last sentence of the Unpublished Opinion, No. 80-1624 (See Exhibit, J, Ex. Supp. § 2255, G84-1251CA, p. 156) from the direct appeal, the court stated, ". . . and the prosecutor did not go

beyond the acceptable bounds of argument in his closing statement." *Id.* at 10 of opinion. Petitioner's § 2255 pleadings did not invent Mr. Morse's closing argument to the jury; Mr. Morse deliberately misrepresented "evidence" related to the essential elements of the crime, i.e., at Tr. 1955 (closing argument):

> He (defense counsel) calls Mr. Jenkins' case a $500 case . . . ladies and gentlemen, it's not the amount of money, it's the lies. It's the misrepresentation. It's the fraud, and that's how the money was obtained. . ." *Id.*

Mr. Jenkins, however, testified he could not remember *any* representations made by either Freeman or Powell (Tr. 474). If the prosecutor can openly misrepresent the testimony of one's accusers as to the essential elements of the crime, where does "due process of law" draw the line of acceptable bounds of argument? Unlike the U.S. Attorneys involved in this case, petitioner had not foisted wild accusations and conclusions regarding such attorneys' misconduct — such § 2255 pleadings cited actual testimony to support his claims and invited each habeas reviewing tribunal to review all the evidence (i.e., Jenkins' complete testimony, Tr. 468-88). The prior adverse ruling respondent and others having clung to can not be saved at the expense of a constitutional right, ***Jackson, supra,*** at 323.

In ***Miller v. Pate,*** 386 U.S. 1 (1966), the Supreme Court detailed how the prosecutor made the "most" of People's Exhibit 3, the tainted evidence, in argument to the jury and concluded the prosecution deliberately misrepresented the truth. This Court should take notice that the basis of leads for discovering the true nature of People's Exhibit 3 was developed at a subsequent unsuccessful state clemency hearing, however, such was not held against Miller in his *second* federal habeas corpus petition nor in his request for certiorari. Petitioner detailed Mr. Morse's deliberate misrepresentation of the evidence in argument to the jury in his § 2255 petition (See Memo, pp. 30-40), however petitioner was not afforded, like Miller, an evidentiary hearing in order to finally establish such government arguments to the jury as false.

In ***McDonald v. Wainwright,*** 466 F.2d 1136 (1972), the Fifth Circuit Court of Appeals specifically rejected the habeas trial court's

argument and held that a prior adverse ruling was not *res judicata* wherein prosecutorial misconduct was at issue. Mr. Morse's closing argument did "impugn the integrity of the fact finding process" and therefore such issue should be considered under § 2255 according to ***Stone, supra,*** at 3044. Petitioner's issue deserves the "full and fair consideration" enumerated in ***Stone, supra,*** at 3049.

The stongest government argument to the trial jury was, "They were promised money, and they ended up with a business plan." The prosecutor wanted to place Century into the business of funding clients. Petitioner did demonstrate how the government manipulated the jury notwithstanding the official trial record which contradicts their illogical syllogism via its closing argument. [For complete text of government's syllogistic argument, see § 2255 Memo, G84-1251CA, sub. para. A thru C, pp. 32-40.]

The prosecutor's syllogistic closing argument was extremely subtle, sophisticated, and deceptive. Morse's "implications" of promises of money were accepted as *representations made by petitioner* and the jury therefore concluded such "representations" were false when made as no one testified as to receiving funding from Century. Likewise, the prosecutor's subterfuge that "everything beyond the 'seed capital' was to be raised through Century's sources" made the representations to Morgan, Edleman, and Webster ("we believe we have sources") *appear* false as Century nor petitioner contacted any sources, therefore, Mr. Morse's conclusion that Century had no sources seemingly appeared to be a logically sound conclusion. But Mr. Morse lied to the jury:

1. No pre-business divorce clients testified to promises of money;

2. No pre-business divorce clients testified to Century promising to raise all funding beyond seed capital;

3. Morgan, Edleman and Webster all testified to Century's Phase II performance, contact sources for possible investment in their companies, as a future performance which was *dependent* upon *their* securing the Phase I limited offering capital (money) *first;* and

4. No pre-business divorce clients were ever due Phase II contingency fee fund raising efforts by Century.

American jurisprudence has long held that a conviction obtained through use of false evidence, fraud and suppression of vital evidence is repugnant to our concept of the "due process of law." ***Miller v. Pate, supra; Mooney v. Holohan,*** 294 U.S. 103 (1935); ***Napue v. Illinois,*** 360 U.S. 264 (1959). "A society can not suppress lawlessness by an accused through the means of lawlessness of the prosecution," ***U.S. ex rel. Montgomery v. Ragen, supra.*** The prior adverse ruling argument avoids the constitutionality issue of the present detention . . . did the prosecutor's closing argument so prejudice the trial jurors' recall of the actual evidence so that this petitioner was denied his right to a fair trial . . . petitioner submits such inquiry has not been undertaken during these Title 28 U.S.C. § 2255 proceedings.

The prior adverse ruling justification for not reviewing Ground 4 under § 2255 is without merit and contrary to the scope of the § 2255 statute as well as ***Miller, supra; McDonald, supra, Stone, supra,*** and other case law.

ARGUMENT V

GROUND 5

> Whether or not the petitioner was entitled to a fair and unfettered direct appeal, denied via "false and misleading appellee briefs" due process issue [i.e., Issue 18 in the § 2255 petition] is reviewable under Title 28 U.S.C. § 2255 considering the habeas trial court's alleged lack of jurisdictional authority to correct errors made on direct appeal.

In denying petitioner consideration of this unconstitutional detention issue, Magistrate Karr's recommendation stated:

> ". . . this court, as the trial court, lacks the authority, first, to assume that the Sixth Circuit Court of Appeals was mis-

led in its review of Freeman's conviction and, second, if that court was misled, to correct that court's mistake." *Id.* at p. 9.

Thereafter, the habeas trial court and such appellate review adopted the lack of § 2255 jurisdiction contention without consideration of the merits upon which such § 2255 pleadings demonstrated unconstitutional detention — denial of right to fair and unfettered direct appeal.

Issue 18, like his other § 2255 issues, speaks to the proposition that "the underlying purpose of 28 U.S.C. § 2255 is to remove the possibility of survival of injustice beyond trial *and appeal.*" ***United States v. Lewis,*** 392 F.2d 440 (C.A. S.C. 1968) (emphasis added).

Petitioner further states the Magistrate's Report (p. 9) which tentatively argues that issue 18 ignores the relationship between a trial court and the appellate courts above it — fails to consider 28 U.S.C. § 2255 is an independent civil suit and not a continuation of the original criminal prosecution. ***Helfin v. United States,*** 358 U.S. 415 (1959). Moreover, such § 2255 jurisdiction extends to grounds that arose at or prior to time of imposition of sentence. ***Barrett v. Hunter,*** 180 F.2d 510 (C.A. Kan. 1970). Magistrate Karr's position, only the Supreme Court can rectify unconstitutional detention when it occurs on direct appeal, would, if allowed to stand, unnecessarily limit the scope and explicit purpose of § 2255.

Again, petitioner respectfully objects to the Magistrate's Report's logic as to his "ample opportunity to set the record straight," *Id.* at 9, regarding issue 18 and the two briefs filed with the 6th Circuit Court of Appeals relating such error on direct appeal (Both the Petition for Rehearing and § 2255 petition spoke to such issue). Numerous petitions, all summarily denied without review, does not provide "ample" opportunity to litigate the issue of whether or not petitioner was denied the right to due process/fair play on direct appeal by respondent submitting false and misleading briefs. Petitioner submits issue 18 has not been substantively reviewed because the Unpublished Opinion's contradictions with the actual testimony tend to illustrate how an overworked appellate court system can start taking shortcuts by relying too heavily upon the government's "version" of the "evidence."

Petitioner's proof of the tainted government brief's impact on the writing of the Unpublished Opinion, and therefore its conclusion, can withstand close scrutiny. Petitioner submits such impact was not de minimis. The appellee briefs' net effect was to rewrite the testimony from the witness stand (See App. D, Exhibit 7). Exhibit 7 demonstrates the factual impossibility of 14 of the 18 government witnesses testifying" . . . Appellant's misrepresentations misled his victims . . . Fourteen witnesses testified to being so misled" as suggested by Appellee's Second Reply Brief, p. 28, and thereafter adopted by the three judge reviewing panel (Unpublished Opinion, p. 1-2):

> "Fourteen 'victim' witnesses in need of 'venture capital' testified about Freeman's alleged 'scheme to defraud' them of money through false representations that Century Consultants could provide them with needed capital for expanding or recapitalizing their present business or starting new enterprises." *Id.*

Petitioner's § 2255 pleadings did demonstrate the cause and effect of such non-evidentiary government argument as unduly influencing the appellate court findings set forth in their Ocotober 1, 1983, Unpublished Opinion. [See appellee brief cause and effect, Memo, sub-para. A through K, pp. 41-66]

To further avoid issue 18, the Magistrate's Report declared this Court "presumably [found] no merit in the argument" set forth in the writ of certiorari (82-1376) and the § 2241 habeas corpus petition (83-664). However, such conclusion is against all legal precedent as no conclusion can ever be drawn from denial of discretionary jurisdiction.

Petitioner respectfully submits that such excuses set forth in the Magistrate's Report to deny review of issue 18 only further demonstrates how petitioner has had "no" opportunity to set the record straight as to all of the judicial proceedings below. In ***Castle v. United States,*** 366 F.2d 394 (C.A. Wash. 1968), the court of appeals made it clear that ". . . Once appellate review is provided due process requires that it remain unfettered." Petitioner's § 2255 petition demonstrates how due process was denied on direct appeal, a

ground cognizable under § 2255 as evidenced by the § 2255 form promulgated by the United States District Courts, p. 4-5, para. 12, sub. para. (j). Paragraph 12 advises: "For your information, the following is a list of the most frequently raised grounds for relief in these proceedings." *Id.* Notwithstanding what sub. para. (j) states "Denial of right of appeal" as a ground most frequently raised, such habeas trial court and habeas reviewing panel adopted the no jurisdiction claim despite petitioner's urgings regarding such form.

Petitioner believes the Magistrate's infallibility argument regarding such direct review and Freeman's ample opportunity to set the record straight is inconsistent with the Supreme Court's ***Kaufman, supra,*** holding: ". . . federal collateral remedies rests more fundamentally on a recognition that adequate protection of constitutional rights relating to criminal trial process requires continuing availability of a mechanism for relief..."

The constitutional right of direct review from a criminal conviction is unassailable. Issue 18 clearly demonstrated the cause and effect of such appellee briefs (G80-1624) upon the Unpublished Opinion. Petitioner submits a direct review without fair play/due process is no different than a withholding of direct review. It follows that such habeas reviewing courts' abdication of jurisdictional authority to entertain an issue from which a constitutional right was shown to have been usurped amounted to the suspension of petitioner's right to habeas corpus. The lack of jurisdiction excuse for not reviewing Ground 5 is without merit and contrary to the scope of the § 2255 statute, the U.S. District Court's own form, as well as ***Lewis, supra; Helfin, supra; Barrett, supra; Castle, supra*** and other case law. Petitioner's issue 18 should have been reviewed in the habeas district court on its merits.

SUMMARY

Petitioner finds himself before this Court because neither the habeas trial court nor such habeas appellate court undertook to review the merits of petitioner's claim(s) that he is being held in violation of the Constitution. Title 28 U.S.C. § 2255. The verified § 2255 petition set forth relevant portions of the trial record from which petitioner demonstrated deprivation of liberty without due process of law.

The habeas reviewing courts below have argued nontheless that whenever a person convicted in a federal court has been given a "full and fair hearing" in the federal system — meaning in this instance federal appellate review of the sufficiency of the evidence (and other issues) — further federal inquiry — apart from the possibility of discretionary review by the Court — should be foreclosed. But Congress in § 2255 has selected the federal district courts as precisely the forums that are responsible for determining whether federal convictions have been secured in accord with federal constitutional law.

The federal habeas corpus statutes presumes the norm of a fair trial in the federal court and adequate federal postconviction remedies to redress possible error. What it does not presume is that these federal proceedings will be without error in the constitutional sense. The duty of a federal habeas corpus court to appraise a claim of constitutional error did occur — reflecting as it does the belief that the "finality" of a deprivation of liberty through the invocation of the criminal sanction is simply not to be achieved at the expense of a constitutional right — is not one that can be so lightly adjured.

> The Court in ***IN RE Winship, Supra,*** stated:
>
> "The requirement of proof beyond a reasonable doubt has (a) vital role in our criminal procedure for cogent reasons . . . Moreover, use of the reasonable doubt standard is indispensable to command respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Id.* at 364.

The lower court decisions, in the instant case, violated the constitutional prohibition of a criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. Clearly the ***Winship*** and ***Jackson*** reasonable doubt standard was not invoked in any review of the prior petitions, otherwise, how can it be said that the U.S. Mails were used in furtherance of the alleged scheme to defraud misrepresentations; wherein Jenkins (Count I) couldn't remember "any" representations; Herbert (Count II) could only recall a discussion of

his problems and solutions to his problems; Clark's (Count III and IV) were only "introduced" to petitioner, and the like.

The ***Winship*** doctrine under § 2255 requires more than simply a summary review of the trial and direct appeal ritual. That doctrine commands that no person be made to suffer the onus of a criminal conviction except upon sufficient proof — defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense. Petitioner's uncontroverted § 2255 facts demonstrate the legal impossibility of such reasonable doubt standard being utilized at trial (i.e., upon motion for judgment of acquittal) or on direct appeal. Yet those same courts in their capacity as habeas reviewing courts utilized their prior unconstitutional decisions as a basis for not addressing the constitutional deficiencies outlined in petitioner's § 2255 pleadings. Petitioner submits such circular argument to avoid habeas review if allowed to stand, would circumvent the § 2255 habeas corpus statute and would be in direct conflict with ***Frady***, ***Kaufman***, ***Stone***, ***Jackson***, and other Supreme Court and appellate court decisions.

Due process of law means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. Before the grand jury, the government fabricated "complainant" statements, manufactured "implications" of funding into promises of funding and suppressed the legal ramifications of the written contracts via government agents' hearsay testimony and documentary evidence produced at trial via the government's closing argument to the jury. Before the appellate court, the government misrepresented the official trial record via its appellee briefs.

Where the government by it agents and employees has willfully contrived a conviction through the pretense of an impartial grand jury investigation, subsequent jury trial and appellate review which are but used as a means of depriving petitioner of his liberty through a deliberate deception of such respective bodies by the presentation of "alleged" evidence known to be false, due process of law requirement cannot be satisfied.

The grounds raised in the § 2255 petition and the facts in support thereof were not addressed in the habeas courts below.

Moreover, there is a conflict in the courts as to the instant case: the District Court in Kansas (84-3110) in denying petitioner's § 2241 petition states "The Court concludes that petitioner's claims may only be presented by § 2255 motion to the sentencing court and that this Court is without jurisdiction over his claims," whereas, the District Court for the Western District of Michigan denied § 2255 jurisdiction under the very same grounds.

Petitioner believes respect and finality of prior decisions has its place in American jurisprudence but not at the expense of § 2255 habeas corpus review of claims demonstrating unconsitutional detention.

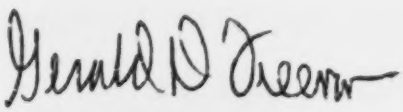
Had petitioner been a state prisoner and presented a prima facie case of unconstitutional detention under § 2254, regardless of the number of unfavorable state postconviction decisions, he would have been entitled to a ***Jackson v. Virginia*** type of review in the federal district court — however, when petitioner presented a prima facie case of unconstitutional detention under § 2255, he's told that a prior unfavorable decision forecloses his opportunity to be heard. Neither Congress nor the equal protection clause of the 5th Amendment permits such an *individuus* discimination between such classes of persons.

Throughout this brief, petitioner has laid claim to his innocence and the apparent lack of any factual inquiry into those portions of the record which conclusively demonstrate the unconstitutionality of his detention despite the prior decisions of each of such habeas reviewing courts. Petitioner believes such a contradiction between his pleadings and facts in support thereof exist because, in the first instance, such prior decisions (i.e., motion for judgment on acquittal and direct review) choose to incorporate an improper reasonable doubt standard and secondly, such habeas corpus courts choose to narrow the scope of § 2255 by re-reviewing their previous decisions rather than testing petitioner's claim(s) that he is being held in violation of the U.S. Constitution. Had the original trial court, at the close of the government's case-in-chief, used the proper reasonable doubt standard when applying the recipient's testimony against the misrepresentations charged as well as such other elements of § 1341 federal mail fraud, petitioner would not have had to serve two years in a federal prison for acts which he did not commit.

CONCLUSION

We respectfully pray such a Writ of Habeas Corpus issue for the purpose of directing the Sixth Circuit Court of Appeals to reverse and remand this case upon a finding of Judgment of Acquittal (N.O.V.) as to all Counts.

Respectfully submitted,



GERALD D. FREEMAN
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APPENDIX A

MAGISTRATE'S REPORT AND RECOMMENDATION (Opinion relied upon by both habeas courts below, see Appendix B) is set forth in its complete text in Appellant's Brief (85-1395), Exhibit "B".

APPENDIX B

No. 85-1395

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

GURN H. FREEMAN, SR.,	:	
	:	
Petitioner, Appellant	:	
	:	
vs.	:	O R D E R
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent-Appellee	:	

BEFORE: **KRUPANSKY** and **GUY**, Circuit Judges; and **PECK**, Senior Circuit Judge

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

It is **ORDERED** that the judgment of the district court be, and it hereby is, **affirmed** upon the opinion of the district court.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

s/_____

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

UNITED STATES OF AMERICA,	No. G84-1251 CA
Plaintiff,	JUDGMENT
v.	APPROVING
GURN H. FREEMAN, SR.	MAGISTRATE'S
Defendant	REPORT AND
_____/	RECOMMENDATION

The Court, having reviewed the Report and Recommendation filed by the United States Magistrate in this action; and having also given new consideration and having reviewed de novo those portions to which specific objection has been made, now, therefore,

Pursuant to such review and determination, IT IS ORDERED that the Report and Recommendation of the Magistrate is approved and adopted as the opinion of the Court.

s/_____

Wendall A. Miles, Chief Judge

Dated: April 22, 1985

APPENDIX C

GOVERNMENT ADMISSIONS:

Reference, Appellee's First Reply Brief, (80-1624), dated Sept. 4, 1981, p. 21:

> "He did promise plans, and in fact did provide them."

Reference, Appellee's Second Reply Brief, (80-1624), dated Oct. 14, 1981, p. 23:

> "Appellant did provide his victims with a plan pursuant to his contract with them."

Reference, Appellee's First Reply Brief, (80-1624), dated Sept. 4, 1981, p. 28:

> "Equity" financing was the 'limited offering' or 'seed capital' which the witnesses, at least some, indeed testified they knew they had to raise themselves."

L 1 TR 473-474 Direct - Jenkins

L 25-6

Q And I realize it's been a long time, sir, but are you able to recall what Mr. Freeman said to you during the discussions?

A No.

Q Are you able to recall what Mr. Powell said?

A No, I am not.

APPENDIX D **EXHIBIT NO. 2**

L 1 TR 301 Direct - Herbert

L 11

Q Do you remember anything that Mr. Freeman said to you?

A Not exactly, no. We just discussed the problem, and possible solutions to the problem.

Q Do you remember any of those possible solutions?

A Well, in general it was basically that we needed more money, and that this is what Century Consultants was in the business to do.

Q To do what?

A To help us secure funds.

L 1 TR 303 Direct - Herbert

L 2

Q (MR. MORSE) Were you ever told by Mr. Freeman of Century Consultants, that they would raise the money?

A You're speaking of Sr.?

Q Mr. Freeman, Sr.?

A No.

L1 TR 323-324 Cross - Herbert

L 21-16

Q Now I will read to you, and you tell me if I read correctly. "There are varied methods used to accomplish the above stated objectives, and should our firm be retained as consultants to assist you, we would prepare a business plan for presentation to you and your attorney. This plan would contain a detailed program for the organization of a new corporation, which would be capitalized for $100,000. This capitalization plan would be designed so that a limited offering could be made by you, and/or your officers and directors."

Now did you read over that language before you parted with any money?

A Yes.

Q And do you understand that when someone says that something is to be done by you, that means you and not them?

A Yes.

Q And did you, after you had this letter, and after you talked about this letter with your lawyer, did you pay $5,000 to Century?

A Yes, we did.

APPELLEE'S REPLY BRIEF (80-1624) p 23:

"Appellant did provide his victims with a plan pursuant to his contract with them."

Q What occurred at that meeting, sir?

A The -- when we immediately met them, we met in Mr. Humphrey's office. As I said, Gurn Freeman and Tom Wagner were there. Gurn Freeman stayed just a short period of time, just as an acquaintance type of a thing, and exchanged a few remarks. Then he left, and we -- Frank and I remained with Tom Wagner and Hubert Humphreys in Hugh's office for maybe a couple of hours.

Q Do you remember any of the little remarks that Mr. Freeman made to you?

A Oh --

Q Were they introductory type remarks?

A Oh, making friends. He introduced the others and gave a little of their background.

L 3-8

Q And do you remember with whom you met at Century Consultants?

A Yes. We met with a Mr. Freeman, Mr. Humphreys and Tom Wagner.

Q Would you tell us -- so it was your father and yourself and those three gentlemen?

A Yes.

Q Would you tell us what happened initially during that meeting?

A Well, at the beginning of the meeting, it was just kind of, you know, social things passed back and forth, and then we were given a small little quick tour of the office facilities there, and --

Q Do you remember who gave you the tour?

A Mr. Freeman gave us the tour, then -- well, it was kind of all three of them. We kind of all walked around together. Then we went back to Mr. Humphrey's office, and Mr. Freeman

explained to us Mr. Humphreys' qualifications and Mr. Wagner's qualifications, and then he excused himself. Then we were with --

Q Excuse me, what were the qualifications that he explained to you, Mr. Freeman?

A Oh, okay. Mr. Humphreys had experience in business ventures. He had experience in the acquiring of capital, and just a lot of general experience and background, and Mr. Humphreys was an older man, he was probably 60, I would say, at that time, and Mr. Wagner's experiences involved insurance, the sale of intangible products and marketing.

Q So after that discussion, what happened, if anything?

A Well, then it was after that that Mr. Freeman left.

L 1 TR 812-813 Redirect - G. Webster

L 20-22

Q Now you testified on cross examination that you knew you had to present something to investors to get them to invest?

A The limited offering.

Q Okay. Is that what you were referring to?

A Well, yes. This is what they instructed me. They made the limited offering, and gave it back to me, and then told me that I had to go out and sell that to ten people.

Q Now sir, was this for the $1,000,000?

A No.

Q This was for -- in the early stages of your --

A In the early stages --

Q Of just obtaining some funds?

A In obtaining funds, working capital.

Q Where were you, as you understood it,

to obtain the bulk of the financing, the $1,000,000, after the initial funding had been done?

A I was told by the consultant and the paperwork here, that the money was to be obtained by them from financial institutions and such.

Q When you said "paperwork", sir, were you referring to Government's Exhibit F-33?

A Yes.

Q. Would you please read the last -- beginning with the last paragraph on page one of F-33 to the end of the letter, which was addressed to you, dated June 9th, 1975, is that correct, sir?

A June 9th, 1975, yes.

L 1 TR 763-764 Cross - G. Wesbster

L 16-9

Now Mr. Webster, the exhibit that I have handed you dated April 22, 1975,

is the exhibit that you drew out of your first conferences with Century Consultants, and was a basis upon which you employed them to be your consultant, is that not correct?

MR. MORSE: Can I have the number on that exhibit?

MR. COLLINS: F-37 -- or 36. They're both the same one, just marked up by handwriting.

Q (MR. COLLINS) Is that correct?

A F-36, yes.

Q And F-36 essentially describes an arrangement, financing plan where there were several phases, isn't that correct? I believe you get to page three --

A Oh, okay.

Q It refers, first of all, to 25,000 and to $125,000 as Phase I, and then Phase II, a capital of $875,000?

A Yes.

APPENDIX D **EXHIBIT NO. 5**

L 1 TR 105-106 Direct - Erbe

L 23-2

Q And I show you what's been marked as Government's Exhibit H-5, and ask if you can identify that?

A Yes. It looks like the letter that was given me by Mr. Freeman.

L 1 TR 107 Direct - Erbe

L 10

MR. MORSE: Your Honor, I would ask at this time that counsel be allowed to publish, not in completeness at this time, but in part, Government's Exhibit H-5, by reading.

"Memorandum to: Mr. Ralph Erbe, from Century Consultants, Inc., July 12th, 1974. We have carefully reviewed all the data you have supplied us, and have carefully weighed all that which you discussed with us during your visit to our offices. This memorandum briefly covers

our thoughts concerning your needs."

APPELLEE'S REPLY BRIEF (85-1395) P. 6:

Mr. Erbe identified a letter given to him by defendant. (TR 105-107) The letter told him Century's "new client committee" had consulted regarding his company and "...believe that your basic program is sound and that with the proper investment capital you could operate such a business at a profit." (TR 107) It went on to discuss the preparation for the organization of a new corporation which would be capitalized for $250,000. The Century fee would be between $13,000.00 and $15,000.00 with a $5,000.00 retainer. (TR 108-110)

L 1 TR 255 Cross - Dawson

L 8

Q Do you know if a man named Gurn Freeman ever worked on your matter?

A No, I do not.

Q Do you know a man named Gurn Freeman?

A No, I do not.

L 1 TR 294-295 Cross - Boeldt

L 13-5

Q Now have you told us about all of the people that you can recollect doing business with under the name Century Consultants Corporation, or Century Consultants International?

A The best of my recollection, I did. Maybe on a phone call, I talked to somebody else sometime or other, but I don't know who they were.

Q But the business that you did was done with Wagner after Powell quit, and with, I guess, Powell and Wagner before

Powell quit?

A Uh-huh. That's right.

Q Is that true?

A That's true.

Q And that no one else acted -- talked with you in a management type of position with Century Consultants Corporation, or Century Consultants International?

A No.

L1 TR 1032-1033 Recross - Wagner

L 24-9

Q Now sir, when did you get your divorce from Mr. Freeman, to use your term? You said you were divorced from him?

A In the fall of '75.

Q That wasn't a court divorce, that was just a divorce where ---

MR. MORSE: Your Honor, I think counsel knows fully well what Mr. Wagner was referring to. I don't think this is necessary.

Q (MR. COLLINS) All right. It was a complete separation, and by divorce you meant to express a complete separation?

A That's correct.

A total of eighteen government witnesses testified at trial:

5..of the 18 "never heard" of petitioner: Dawson (TR 255); Raleigh (TR 629-630); Boeldt (TR 294-295); Quasius testimony is completely silent as to petitioner as was Michael Webster, the bank employee who only identified wire transfers.

6..could not have testified as the Government and the Appellate Court said they had: Jenkins could not recall "any" representations by petitioner (TR 473-474); Herbert could only recall a discussion of his problems and possible solutions to his problems (TR 301-302); Howard, Herbert's partner testified that he never met petitioner until the last meeting (TR 345), which took place months after the services had been

contracted for and paid; Frank Clark testified he was only "introduced" to petitioner and no business was discussed (TR 409-410) and Henry Clark testified likewise (TR 367-368); Charlotte Webster testified she met petitioner on June 9, 1975 (TR 831-832); her husband Gordon Webster contracted for services on April 22, 1975, and paid the fees in question on May 29, 1975, and all of which took place prior to such June 9th conversation testimony by Mrs. Webster.

3..Were not even alleged to be victims: Abrams, Century's secretary; Conrad, Edleman's attorney and Wagner a co-defendant, nor did any of them give heresay testimony supporting such inference.

4..Morgan, Edleman, Erbe and Gordon Webster, as did "all" other witnesses,

embraced the written contract which advised that clients had to raise their own money, i.e., Morgan "...the whole process was laid out" (TR 496) "...(it) was for me to find $200,000 ...this was made clear to me before -- before I parted with any money" (TR 498); Edleman testified that petitioner "told" him he had to raise his money in steps (TR 143) and Webster testified that his first contract, which advised he must raise the money, was the result of his first meetings and was the basis for his employing Century ($3,500 retainer and subsequent payment of $7,500, the fees in question, Count 7, (TR 763-764)) and at TR 812-13 Webster again made it clear "he" had to raise the "limited offering" funds (first contract) and Century was to raise "...the $1,000,000 after the initial funding had been done," a "future

performance" to be performed on a "contingent fee" basis (second contract, June 9, 1975), an event which Webster foreclosed when he admittedly "embezzled" his shareholders limited offering funds (TR 755).

However, none of the 18 witnesses gave testimony as the Government represented to the Sixth Circuit Court of Appeals.